

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

COLVIN J. PLUMMER,

Plaintiff,

vs.

ROBERT BANNISTER, et. al.

Defendants.

3:11-cv-00865-ECR-WGC

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Edward C. Reed, Jr., Senior United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. Before the court is Defendants' Motion to Dismiss. (Doc. # 12.)¹ Plaintiff opposed (Doc. # 17) and Defendants replied (Doc. # 18). After a thorough review, the court recommends that Defendants' motion be granted.

I. BACKGROUND

At all relevant times, Plaintiff Colvin J. Plummer was an inmate in custody of the Nevada Department of Corrections (NDOC). (Pl.'s Compl. (Doc. # 4) at 1.) The events giving rise to this litigation took place while Plaintiff was housed at Northern Nevada Correctional Center (NNCC). (*Id.*) Plaintiff, a *pro se* litigant, brings this action pursuant to 42 U.S.C. § 1983. (*Id.*) Defendants are Robert Bannister, Marsha Johns, David Mar, and Karen Gedney. (*Id.* at 2-3.)

¹ Refers to court's docket number.

1 On screening, the court determined that Plaintiff states a colorable claim under the
2 Eighth Amendment for deliberate indifference to serious medical needs related to the alleged
3 denial of pain medication for longstanding pain associated with a chronic hip condition and a
4 failure to refer Plaintiff to a specialist for a hip replacement. (Screening Order (Doc. # 3) at 2.)

5 Defendants move to dismiss this action arguing that Plaintiff failed to exhaust his
6 administrative remedies prior to filing his Complaint. (Doc. # 12.)

7 **II. LEGAL STANDARD**

8 The PLRA provides that “[n]o action shall be brought with respect to prison conditions
9 under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail,
10 prison, or other correctional facility until such administrative remedies as are available are
11 exhausted.” 42 U.S.C. § 1997e(a). An inmate must exhaust his administrative remedies
12 irrespective of the forms of relief sought and offered through administrative avenues. *Booth*
13 *v. Churner*, 532 U.S. 731, 741 (2001). The Supreme Court has clarified that exhaustion cannot
14 be satisfied by filing an untimely or otherwise procedurally infirm grievance, but rather, the
15 PLRA requires “proper exhaustion.” *Woodford v. Ngo*, 548 U.S. 81, 89 (2006). “Proper
16 exhaustion” refers to “using all steps the agency holds out, and doing so *properly* (so that the
17 agency addresses the issues on the merits).” *Id.* (quoting *Pozo v. McCaughtry*, 286 F.3d 1022,
18 1024 (7th Cir. 2002)) (emphasis in original).

19 This court has interpreted Justice Alito’s majority opinion in *Woodford* as setting forth
20 two tests for “proper exhaustion”: (1) the “merits test,” satisfied when a plaintiff’s grievance is
21 fully addressed on the merits by the administrative agency and appealed through all the
22 agency’s levels, and (2) the “compliance test,” satisfied when a plaintiff complies with all critical
23 procedural rules and deadlines. *Jones v. Stewart*, 457 F. Supp. 2d 1131, 1134 (D. Nev. 2006).
24 “A finding that a plaintiff has met either test is sufficient for a finding of ‘proper exhaustion.’
25 Defendants must show that Plaintiff failed to meet both the merits and compliance tests to
26 succeed in a motion to dismiss for failure to exhaust administrative remedies.” *Id.*

27 The failure to exhaust administrative remedies is treated as a matter in abatement and
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1 is properly raised in an unenumerated Rule 12(b) motion to dismiss. *Wyatt v. Terhune*, 315
2 F.3d 1108, 1119 (9th Cir.2003). Failure to exhaust administrative remedies is an affirmative
3 defense, and defendants bear the burden of raising and proving failure to exhaust. *Id.* A court,
4 in deciding a motion to dismiss based on exhaustion, may look beyond the pleadings and decide
5 disputed issues of fact without converting the motion into one for summary judgment. *Id.*
6 (citing *Ritza v. Int'l Longshoremen's & Warehousemen's Union*, 837 F.2d 365, 368 (9th Cir.
7 1988) (per curiam)). If a court concludes that the prisoner bringing a suit has failed to exhaust
8 nonjudicial remedies, “the proper remedy is dismissal of the claim without prejudice.” *Id.* at
9 1120.

10 For prisoners within the NDOC system, exhaustion of administrative remedies requires
11 complying with the inmate grievance procedure set forth in NDOC Administrative Regulation
12 (AR) 740. (Doc. # 12 at 3-4; Doc. # 12-2 at 2-13 (Ex. A).) Under the version of AR 740 effective
13 during the time period in question, the procedure consisted of: (1) an informal level grievance;
14 (2) a first level grievance; and (3) a second level grievance. (*Id.*)

15 III. DISCUSSION

16 According to Defendants, Plaintiff failed to exhaust his administrative remedies *prior*
17 to filing his Complaint. (Doc. # 12 at 5.)

18 Plaintiff's Complaint and application to proceed in forma pauperis were submitted to
19 the court on December 1, 2011. (*See* Doc. # 1.)

20 A review of the grievance documentation submitted by Defendants reveals that Plaintiff
21 submitted an informal level grievance, number 2006-29-3109, related to treatment of his hip
22 condition on September 21, 2011. (Doc. # 12-2 at 16-17.) It appears that the informal level
23 grievance was denied on December 23, 2011. (*Id.* at 16.) Plaintiff filed a first level grievance
24 on December 26, 2011. (*Id.* at 20.) The response to the informal level grievance was upheld
25 at the first level on January 24, 2012. (*Id.* at 20.)

26 Plaintiff filed an informal level grievance, number 2006-29-33732, related to the
27 discontinuation of his pain medication on October 13, 2011. (Doc. # 12-2 at 23-24.) This was
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1 denied by NDOC personnel on December 23, 2011. (*Id.*) Plaintiff filed his first level grievance
2 related to this issue on December 26, 2011. (*Id.* at 27.) The informal level grievance decision
3 was upheld at the first level on January 24, 2012. (*Id.*)

4 The foregoing demonstrates that Plaintiff failed to exhaust his available administrative
5 remedies by proceeding through *each* of the *three* levels of NDOC's grievance process *before*
6 filing this action.

7 The Ninth Circuit has made it clear that the PLRA requires exhaustion *prior* to
8 initiation of the lawsuit. *See McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002) (per
9 curiam) (exhaustion requirement does not permit prisoner to file complaint addressing non-
10 exhausted claims even if he exhausts while case is pending); *see also Vaden v. Summerhill*, 449
11 F.3d 1047, 1050-51 (9th Cir. 2006) ("The bottom line is that a prisoner must pursue the prison
12 administrative process as the first and primary forum for redress of grievances. He may initiate
13 litigation in federal court only after the administrative process ends and leaves his grievances
14 unredressed. It would be inconsistent with the objectives of the statute to let him submit his
15 complaint any earlier than that."). Allowing Plaintiff to proceed with claims without having
16 exhausted *prior to* filing his complaint would create an end-run around the PLRA, which
17 provides that "[n]o action shall be brought with respect to prison conditions...until such
18 administrative remedies as are available are exhausted." 28 U.S.C. § 1997(e); *see also Vaden*,
19 449 F.3d 1050-51; *McKinney*, 311 F.3d at 1199-1201.

20 Plaintiff cites authority from other circuits for the proposition that special circumstances
21 may justify a prisoner's failure to comply with the exhaustion requirements. (*See* Doc. # 17 at
22 2.) That is not the status of the law in the Ninth Circuit. While the Ninth Circuit has recognized
23 exceptions to the exhaustion requirement, none of the recognized exceptions are applicable
24 here. *See Nunez v. Duncan*, 591 F.3d 1217, 1224 (9th Cir. 2010) (citation omitted) (recognizing
25 as exceptions: "administrative procedures were unavailable, that prison officials obstructed
26 [an] attempt to exhaust or that [the inmate] was prevented from exhausting because
27 procedures for processing grievances weren't followed."); *see also Sapp v. Kimbrell*, 623 F.3d
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813, 822 (9th Cir. 2010) (“We have recognized that the PLRA therefore does not require exhaustion when circumstances render administrative remedies ‘effectively unavailable.’”).

Having failed to exhaust available administrative remedies *prior to* filing his Complaint, Plaintiff’s action should be dismissed without prejudice.

IV. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Judge enter an order that Defendants’ motion (Doc. # 12) be **GRANTED** and Plaintiff’s Complaint be **DISMISSED WITHOUT PREJUDICE**.

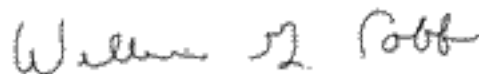
IT IS HEREBY FURTHER RECOMMENDED that the District Judge enter an order that Plaintiff’s pending Motion for Preliminary Injunction (Doc. # 11) be **DENIED AS MOOT**.

The parties should be aware of the following:

1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, specific written objections to this Report and Recommendation within fourteen (14) days of receipt. These objections should be titled “Objections to Magistrate Judge’s Report and Recommendation” and should be accompanied by points and authorities for consideration by the District Court.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1), Fed. R. App. P., should not be filed until entry of the District Court’s judgment.

DATED: September 18, 2012.



WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE